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Margie M. Jeppson v. Emelia Larson Jeppson and Thora Jeppson Spilker, Ervin F. Jeppson, Alta Jeppson Jensen, Ovid A. Jeppson, Ruth Jeppson Sjostron and Norda Jeppson : Brief of Appellant

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

MARGIE M. JEPPSON, sometimes
known as MARGIE M. JEPPSON
EDGEL,

Plaintiff and Respondent,

vs.

EMELIA LARSON JEPPSON,

Defendant and Appellant,

and THORA JEPPSON SPILKER,

ERVIN F. JEPPSON, ALTA JEPPSON

JENSEN, OVID A. JEPPSON, RUTH

JEPPSON SJOSTRON and NORDA

JEPPSON,

Intervening Defendants,

Case No. 81353

Brief of Appellant

Appeal from the District Court of

Salt Lake County, State of Utah,

Honorable J. Allan Crockett, Judge.

FILED

DEC 24 1948

BY GRAND P. BACKMAN

~~Attorney~~ for Defendant and Appellant

CLERK, SUPREME COURT, UTAH

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JEPPSON,

Intervening Defendants,

Brief of Appellant

I.

STATEMENT OF FACTS

This is an action brought by the respondent to quiet the title of the respondent as against the appellant to the following described real property situated in Salt Lake County, State of Utah, to-wit:

Commencing 80 rods North and 27.5 rods East from the Southwest corner of Section 29, Township 2 South, Range 1 East, Salt Lake Base and Meridian and running thence South $46^{\circ} 27'$ East 155 feet; thence North $43^{\circ} 33'$ East 120 feet, more or less, to a point 40 rods due East of West line of said Section 29; thence South 307 feet, more or less, to a point 60 rods North of the South line of said Section 29; thence West 479 feet to Easterly line of State Road; thence Northeasterly along said State Road to place of beginning.

Also, commencing 80 rods North and 27.5 rods East and North $43^{\circ} 33'$ East 160 feet from the Southwest corner of Section 29, Township 2 South, Range 1 East, Salt Lake Base and Meridian, and running thence South $46^{\circ} 27'$ East 155 feet; thence South $43^{\circ} 33'$ West to a point 80 rods due North of the South line of said Section 29; thence East 39 rods, more or less to the center of the Southwest quarter of said Section 29; thence North 10 chains; thence West, to Easterly line of State Road; thence South $43^{\circ} 33'$ West 750 feet, more or less, to the place of beginning.
(Tr. 1)

The property in question was part of the tract of land which was owned by Ephraim Jeppson, deceased, the husband of the appellant and the father of the respondent. The estate of the said Ephraim Jeppson, deceased, was entered for probate on February 6, 1934 in the District Court of the Third Judicial District in and for Salt Lake County, State of Utah, as Probate File No. 18361. The appellant, Emelia Larson Jeppson, who was the widow of Ephraim

Jeppson, deceased, and the mother of the respondent was appointed administratrix of said estate. (Tr. 33)

The administratrix had caused the real property of the estate to be appraised by the duly appointed appraisers of the Court and the appraisal was in the sum of \$2400.00.

The real property of the estate had been mortgaged by the administratrix under the authorization and direction of the Court to the Home Owners' Loan Corporation under date of March 9, 1934 in the sum of \$1973.62. (Tr. 33)

The respondent claims that she was a creditor of the estate in the amount of approximately \$320.94.

During the month of April, 1936, the appellant as administratrix of said estate petitioned the Court for confirmation of the sale of the real property of the estate to the respondent and under date of April 17, 1936, an order confirming the sale to the respondent Margie Jeppson for the sum of \$2205.45, the highest bidder, was entered by the Court. This consideration was discharged by the respondent's claim above mentioned in the sum of \$320.94 and by her assumption of the mortgage in favor of Home Owners' Loan Corporation in the remaining balance of \$1884.51. (Tr. 33)

An administratrix's deed issued under date of April 18, 1936, from Emelia L. Jeppson, administratrix of the estate of Ephraim Jeppson, deceased, in favor of Margie Jeppson, and said administratrix's deed was recorded April 27, 1936, in Book 165 of Deeds, pages 249-50, records of the Office of the County Recorder of Salt Lake County, State of Utah. The said appellant did not sign the deed in her individual capacity and has never made conveyance or

delivery of a deed conveying her statutory dower interest. (Tr. 34)

The real property claimed by the respondent is fenced, unimproved pasture land, excepting one corner of said tract which is occupied by a canning company for canning purposes.

The appellant caused the other defendants to intervene and in the answer and counter-claim in intervention the said appellant claims a fee simple interest in an undivided one-third interest. (Tr. 12)

Twelve days after the execution of the administratrix's deed, to-wit: April 30, 1936, the State Road Commission of Utah purchased a right-of-way for a highway through the property and paid the respondent \$1892.50, from which sum the remaining balance of the Home Owners' Loan Corporation Mortgage was paid and the property was released from the lien of said mortgage. (Tr. 33) Subsequently on February 15, 1937, the respondent at the request of the appellant executed and delivered to Ervin Fenton Jeppson, one of the intervening defendants and the son of the appellant, a warranty deed to a certain portion of the premises which had been conveyed to her by administratrix's deed, consisting of approximately 5 acres of unimproved property; the consideration for the conveyance being that the said Ervin Fenton Jeppson would remodel the old home to make it liveable for the appellant. (Tr. 82)

On the 27th day of July, 1939, after the said Ervin Fenton Jeppson had improved the old home, the respondent deeded to the appellant a portion of said premises described in said administratrix's deed consisting of 56/100 acres upon which the old home was located. No consideration

passed from the appellant to the respondent for this conveyance and the appellant now lives on the premises so conveyed to her by respondent. (Tr. 83, 86)

On another occasion the respondent gave a deed to the appellant for another portion of said premises known as the Snedeger Tract, and when the said tract was improved with a two-room house it was sold to Snedeger. The \$700.00 received for the conveyance was paid to the appellant, Emelia Larson Jeppson. (Tr. 82, 109)

The balance of the premises has been pastured by Ervin F. Jeppson, one of the intervening defendants. All general taxes with the exception of the year 1947 were paid by the said Ervin F. Jeppson. (Tr. 34, 89)

In the defendant's answer in intervention it is stated that the claim of the respondent of \$325.94 satisfied by the execution and delivery of said administratrix's deed, represented an accumulation of monies advanced by all other heirs of said estate as well as the respondent.

II

SPECIFICATION OF ERRORS

Comes now the above-named appellant and says that there is manifest error in the records, proceedings and judgment entered in this cause in this, to-wit:

1. The Court erred in making and entering its findings of fact numbered 1 as follows, to wit: "That the plaintiff is the sole, legal and equitable owner of the following described tract of land situated in the County of Salt Lake, State of Utah, and particularly described as follows, to-wit:

Commencing 80 rods North and 27.5 rods East from the Southwest corner of Section 29, Township 2 South, Range 1 East, Salt Lake Base and Meridian, and running thence South $46^{\circ} 27'$ East 155 feet; thence North $43^{\circ} 33'$ East 120 feet, more or less, to a point 40 rods due East of West line of said Section 29; thence South 307 feet, more or less, to a point 60 rods North of the South line of said Section 29; thence West 479 feet, to Easterly line of State Road; thence Northeasterly, along said State Road, to place of beginning.

Also, commencing 80 rods North and 27.5 rods East and North $43^{\circ} 33'$ East 160 feet from the Southwest corner of Section 29, Township 2 South, Range 1 East, Salt Lake Base and Meridian, and running thence South $46^{\circ} 27'$ East 155 feet; thence South $43^{\circ} 33'$ West, to a point 80 rods due North of the South line of said Section 29; thence East 39 rods, more or less, to the center of the Southwest quarter of said Section 29; thence North 10 chains; thence West, to the East-line of State Road; thence South $43^{\circ} 33'$ West 750 feet, more or less, to the place of beginning.

for the reason that there was not sufficient competent evidence to support or warrant said finding. (Page 38 of Transcript)

2. The court erred in making and entering its finding of fact numbered 3 as follows: "That in the purchase aforesaid the said plaintiff purchased the said property for her own use and benefit, and not as trustee for the defendant and the said intervening defendants or any one of them and that the plaintiff paid the consideration therefore in the manner directed by this court," in that there was no compe-

tent evidence to the effect that she said plaintiff paid the consideration therefor. (Page 38 of Transcript)

3. The court erred in making and entering its finding of fact numbered 5 as follows: "That the claims of the said defendant and each and all of the said intervening defendants in and to the said described property are without right whatever, and that said defendant and all of the said intervening defendants have no right, title, estate, equity or interest of, in or to the said real property or any part thereof", for the reason that there was not sufficient competent evidence to support or warrant said finding that the said defendant, Emelia Larson Jeppson, has conveyed her interest in said premises. (Page 38 of Transcript)

4. The court erred in making and entering its finding of fact to that portion of No. 6 as follows: "Said defendant is now barred and estopped from asserting any interest of, in, or to the premises retained by the plaintiff and heretofore particularly described", for the reason that there was not sufficient competent evidence to support or warrant said finding. (Page 38 of Transcript)

5. The court erred in overruling the motion of appellant for a new trial as shown on page 44 of the transcript.

6. The court erred in rendering judgment in favor of the respondent against the appellant as shown on pages 35 and 36 of the transcript.

7. The court erred in its denial of the judgment in favor of the appellant and against the respondent.

POINTS ARGUED BY APPELLANT

(a) THE EVIDENCE IS INSUFFICIENT TO SUPPORT A FINDING THAT THE RESPONDENT IS THE SOLE, LEGAL AND EQUITABLE OWNER OF THE TRACT OF LAND DESCRIBED IN SAID COMPLAINT.

The court erred in making finding of fact No. 1 herein-above set out in specification of errors paragraph 1.

Appellant contends that because she did not join in the administratrix's deed in her individual capacity her statutory interest in an undivided one-third interest in the premises described in the said administratrix's deed has not been conveyed and that the said appellant is now the owner of an undivided one-third interest in said premises.

Our statutes expressly abolish the common law estates of dower and curtesy. (Section 101-4-9, Utah Code Annotated, 1943). In lieu thereof, Section 101-4-3, U. C. A. 1943, provides.

"One third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage, to which the wife has made no relinquishment of her rights, shall be set apart as her property in fee simple, if she survives him . . . Property distributed under the provisions of this section shall be free from all debts of the decedent except those secured by liens for work or labor done or material furnished exclusively for the improvement of the same, and except those created for the purchase thereof, and for taxes levied thereon"

Our Supreme Court had occasion to construe the above section in the case of *In re BULLEN'S ESTATE*, 47 Utah 96, 151 Pac. 533, wherein the court said:

“What the wife receives under Section 2826 [which is identical with Section 101-4-3, U. C. A. 1943]—one third in fee simple of all the legal and equitable estates in real property possessed by the husband during coverture and not relinquished by her — she receives, not as an heir of her husband, but in her own right, something which belongs to her absolutely and of which she could not have been deprived by will or by any other voluntary act of her husband without her consent. Under that section, she is not an heir within the meaning of our intestate or succession statutes.”

A number of authorities are reviewed in the opinion, and among others, the court quotes the following from “In re ESTATE OF STRAHAN, 93 Neb. 828:

“It has been held by the great weight of authority that dower is not immune because it is dower, but because it, like the right to the homestead and to the distributive share of the widow of the estate of her deceased husband, belonged to her inchoately during his life and vested fully in her at his death. Under the present statute the wife takes her interest in the estate of her deceased husband by operation of law. It is something which belongs to her absolutely and independently of any right of inheritance of succession. The share of the realty which under our law goes to the widow independent of any will or act of the husband is not, so to speak, a part of his estate and is no more liable to a succession tax at his death than is her individual property derived from her own ancestors and held in her own name, though the husband may have had the

management and control of the estate during his lifetime."

Thus a widow holds her statutory interest, absolutely and in fee simple, in her own right and completely independent of the estate of her husband. Her interest is not a part of the husband's estate and is not subject to the husband's debts except such as are enumerated in the statute, i. e. those incurred directly for the benefit of the property involved. The interest, not being a part of the husband's estate, does not pass to a purchaser under a probate sale of the property belonging to the husband's estate, unless the widow joins in the conveyance in her own right or is otherwise estopped from claiming her interest. If it be argued that the construction placed upon the statute in the case of *In re Bullen's Estate* was influenced by the fact that it was a case involving the inheritance tax statute wherein the tendency is to construe the statute in favor of the taxpayer, the case of *STAATS v. STAATS*, 63 Utah 470, 226 Pac. 677, broadens the interpretation to other than tax cases. That case involved a contest between a widow and son respecting the husband's realty, the son claiming that he was entitled to some as surviving partner of his father and to other of the property as tenant in common. The court said:

"Counsel have cited some authorities to the effect that a widow of a deceased husband takes her dower interest as an heir, and that she is protected under the statute aforesaid. [Statute relating to disqualification of interested witnesses]. This court is, however, committed to a contrary doctrine, in that we have held that under our statute the widow of a deceased husband does not

take as an heir. In *re Bullen's Estate*, 47 Utah 96. It is held that a widow takes here one third interest in her husband's real estate not as an heir, but in her own right. That case was subsequently approved and followed in *Re Kohn's Estate*, 56 Utah 17, 189, Pac. 409."

As to the manner in which the widow's interest matures from an inchoate interest held during her husband's lifetime into an absolute interest the court In *Re Reynolds' Estate*, 90 Utah 415, 62 Pac. (2nd) 270, has this to say:

"... The wife's interest has some of the aspects of joint tenancy in one-third of the real estate. In the common law joint tenancy, each owned every bit of the whole. One who dies simply fell away from the title. The husband by predeceasing her does not effectuate a passage of title of her one third, but only recedes from the interest she had, at the same time maturing it."

WAS WIDOW'S INTEREST DIVESTED BY THE PROBATE SALE?

The appellant, Emelia Larson Jeppson, the widow of Ephraim Jeppson, the latter being the record owner of the premises involved in this action at the time of his demise, was at the time of her husband's death the owner in fee simple of one third of the said real estate. Was that interest divested by virtue of the probate sale of the property in the matter of the Estate of Ephraim Jeppson, deceased? Speaking of the interest which passes under a probate sale, it is said in 21 *American Jurisprudence*, Executors and Administrators ¶ 568:

“All that it (the probate court) ever pretends to do in a proceeding of this character is to order the sale of whatever interest the decedent may have had in the land at the time of his death. It never assumes to decide whether he was in fact the owner.”

Since the decedent here had no interest in the widow's statutory estate, that interest did not pass merely by virtue of the probate sale. The rule as to dower and curtesy rights is slated in 24 C. J. 684:

“As a widow's dower is not usually subject to the general debts of the husband, her right to dower, or to a statutory estate in the nature thereof, is not usually divested by an administration sale, although under some statutes the rule is otherwise.” (citing decisions from a number of states)

A footnote on the same page of 24 C. J. quotes from *SHELL v. YOUNG*, 78 Ark. 479, 95 S. W. 798:

“The sale is simply inoperative, so far as the widow's dower is concerned, as it is an interest in the land superior to the claims of creditors, and the purchaser simply took subject to the right of the widow's dower, which may be set aside against the purchaser as well as the heirs and creditors. *Livingston v. Cochran*, 33 Ark. 306; *Well v. Smith*, 40 Ark. 17”

In *OWEN v. SLATTER*, 26 Ala. 547, 62 Am. D. 745, the sale was made by commissioners appointed by the court upon the petition of the widow as administratrix. The court said:

"The sale of the real estate, made under decree of the Probate Court, vests in the purchasers only the title which the ancestor had, and which upon his death descended upon his heirs-at-law. The widow's right to dower is unaffected by the sale, unless, indeed, she bars her right by some act which, in a court of equity, would constitute it a fraud in her to insist upon it.

"The fact in the case before us do not make out such a bar. True, the widow in that case is administratrix; but the law prescribes her duty, and so long as she acts within the scope of those duties, it would be singular indeed that she should forfeit her rights as an individual, merely by reason of her having properly complied with the requirements of the law in her fiduciary character

"We are of the opinion, therefore, that there was no fraud on the part of Mrs. Owen, in failing to announce at the sale that the land was sold subject to her dower; neither is she estopped from setting up her claim to dower by reason of her silence."

It is submitted that although in our state dower has been expressly abolished and many of the cases cited in this brief deal with dower in the common law sense, many of the same rules apply. Almost all of our states have either abolished or modified by statute the rules of the common law with respect to dower and curtesy, but the terminology and rules of interpretation and construction have been retained. See 42 Harvard Law Review 330. It is there said that "although common law dower and curtesy have been superseded by more extensive statutory provisions in the United States, the decisions of the courts in construing

dower and curtesy are still used in the interpretation of our present statutes. Consequently, the legal rules and principles incident to the common law system are usually applied to the present statutory system.” Moreover, the statutory estate conferred in this state in lieu of dower is a larger estate than the common law estate of dower, and therefore requires at least as strong an act on the part of the widow to divest that estate as did the common law estate of dower. And by the same token, this interest requires at least as much protection by our courts as was the case with common law dower.

“Dower has ever been a favorite of the law, statutes granting being liberally construed in the wife’s favor, and it is uniformly held that no construction of a statute should be adopted which tends to deprive the wife of her right thereto or of any beneficent provision given in lieu thereof.” 2 Tiffany on Real property (3rd Ed.) p. 451, citing cases.

SALE BY WIDOW AS ADMINISTRATRIX AS BARRING RIGHT

As is shown above, a probate sale of the husband’s realty does not of itself divest the widow of her dower interest in the land. We shall now consider the question of whether a probate sale conducted by the widow as administratrix of her husband’s estate bars her dower interest. The cases are collected in an annotation in 30 A. L. R. 944. The annotation begins:

“A deed of real estate by the widow of the owner as his administratrix, made under the order of the probate

court, does not bar her from claiming dower in the real estate so sold.

Wright v. DeGroff, 14 Mich. 165;
 Foley v. Boulware, 86 Mo. App. 674;
 Sip v. Lawback, 17 N. J. L. 442;
 Shurtz v. Thomas, 8 Pa. 359.”

In the Sip v. Lawback case above referred to, where a widow and two other persons were administrators of the husband's estate and sold land by an order of the court, the court states:

“Defendant knew of widow's right of dower or might have known it, except for his own negligence, —Defendant was a neighbor to Mr. Sip and his wife, he knew that Mr. Sip died intestate, he knew he was treating with administrators for the purchase of the land and that the act of the legislature (which every man shall be presumed to know) entitled the widow to dower. It was an administrators sale, the advertisement, the articles of vendue and the whole proceedings was notice to everyone that the widow was only selling as administratrix and only selling such title and interest in the land as an administratrix could sell.”

It is the opinion of counsel that the case before the Court is even stronger than the above cited case as certainly the plaintiff, the daughter of the defendant, Emelia Larson Jeppson, knew that Mr. Jeppson died intestate and she also knew or was presumed to know that her mother had a statutory dower interest in the real property possessed by the husband at the time of his death.

In *Foley vs. Boulware*, 86 Mo. App. 674, the widow was not estopped from claiming dower in the land, although she told the purchaser before the sale that the title was good and perfect and gave no intimation that she claimed dower, but there was nothing to show that she was acting in bad faith.

In *Martien v. Norris*, 91 No. 465, the declaration of the agent of the executors to the purchaser, "that the title was perfect or unquestionable" did not have the effect of estopping the widow from claiming dower, although she thought at the time that she was not entitled to dower.

In *Wright vs. DeGroff*, 14 Mich. 164, the administratrix deed contained the following clause:

"And I do hereby covenant with said _____ that I will warrant and defend said premises against the lawful claims and demands of all persons claiming by, from, or under me, but against no other person."

It was held that she was not estopped thereby to claim dower in the land.

Under this annotation the cases which allow an estoppel of the claim of dower are where the facts can be construed as a surrender of the right of dower. As an example, *Gerber vs. Upton*, 123 Mich. 605, where it appeared that the purchaser agreed with the widow to pay the full value of the land, and *that she was to surrender her right of dower and homestead interest and to give a deed therefor to him and that it was announced at the sale that the purchaser would obtain a clear title.*

Also, *Stephens vs. Craigen Co.* 192 N. Y. Supp, 555, in the body of the deed it recites:

“All the estate therein which the party of the first part has or has power to convey or dispose of, whether individually or by virtue of said will or otherwise.”

None of these facts apply to the present case.

(b) THE EVIDENCE IS INSUFFICIENT TO SUPPORT A FINDING THAT THE CLAIM OF SAID APPELLANT IS WITHOUT RIGHT WHATEVER, AND THAT SAID APPELLANT HAS NO RIGHT, TITLE, ESTATE, EQUITY OR INTEREST OF, IN, OR TO THE SAID REAL PROPERTY OR ANY PART THEREOF.

The court erred in making finding of fact No. 5 hereinabove set out in specification of errors paragraph 3.

Same points argued by appellant under subdivision (a) above applies to this subdivision.

(c) THE EVIDENCE IS INSUFFICIENT TO SUPPORT A FINDING THAT THE APPELLANT IS NOW BARRED AND ESTOPPED FROM ASSERTING ANY INTEREST OF, IN OR TO THE PREMISES RETAINED BY THE RESPONDENT.

The court erred in making finding of fact No. 6 hereinabove set out in specification of errors paragraph 4.

Same points argued by appellant under subdivision (a) above applies to this subdivision.

WHEREFORE appellant prays that the judgement be reversed with costs assessed against respondent.

Respectfully submitted,

LE GRAND P. BACKMAN,
Attorney for Defendant and Appellant

Received copy of the foregoing brief of appellant this

—— day of December, 1948.

Attorneys for Plaintiff and Respondent

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